

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII CIVIL RIGHTS COMMISSION

Amendments to Chapter 121-46
Hawaii Administrative Rules
date of adoption

1. Section 12-46-109, Hawaii Administrative Rules, is amended to read as follows:

"§12-46-109 Sexual harassment. (a) Harassment on the basis of sex is a violation of chapter 378, HRS. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature constitute sexual harassment when:

- (1) Submission to that conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- (2) Submission to or rejection of that conduct by an individual is used as the basis for employment decisions affecting that individual; or
- (3) That conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) [An employer shall be responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted in either a supervisory or agency capacity.]

[(d)] With respect to conduct between employees, an employer shall be responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. [An employee who has been sexually harassed on the job by a co-worker should inform the employer, its agent, or supervisory employee of the harassment; however, an employee's failure to give such notice may not be an affirmative defense.]

[(e)] (d) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees at

the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the non-employees.

[(f)] (e) Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

[(g)] (f) Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring." [Eff] (Auth: HRS §§368-3, 378-3) (Imp: HRS §§368-3 378-2)

2. Section 12-46-175, Hawaii Administrative Rules, is amended to read as follows:

"§12-46-175 Harassment. (a) Harassment on the basis of ancestry is a violation of chapter 378, HRS.

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's ancestry constitute harassment when this conduct:

- (1) Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- (2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (3) Otherwise adversely affects an individual's employment opportunity.

(c) The employer has an affirmative duty to maintain a working environment free of harassment on the basis of ancestry.

(d) [An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.]

[(e)] With respect to conduct between fellow employees, an employer shall be responsible for acts of harassment in the workplace on the basis of ancestry, where the employer, its agent, or supervisory employee, knows or should have known of

the conduct, unless the employer can show that it took immediate and appropriate corrective action.

[(f)] (e) An employer may be held responsible for acts of non-employees with respect to harassment of employees on the basis of ancestry, where the employer, its agent, or supervisory employee, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees." [Eff] (Auth: HRS §§368-3, 378-3)
(Imp: HRS §§368-3 378-2)

3. Regulatory material to be repealed is bracketed. New regulatory material is underscored.